88-973

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

SOUTHERN INDIANA GAS & ELECTRIC COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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December 9, 1988

QUESTIONS PRESENTED

1. Whether employees under the National Labor Relations Act ("NLRA") can decide by themselves through a "Globe" self-determination election what the appropriate unit for collective bargaining should be in order for the National Labor Relations Board ("NLRB") to find an unlawful refusal to bargain in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), with respect to the new "globed" unit without having an appropriate unit determination made by the NLRB?

LIST OF PARTIES
RULE 28.1 LIST

The parties to the proceedings below were the Petitioner, Southern Indiana Gas and Electric Company of Evansville, Indiana, and the Respondent, the National Labor Relations Board of Washington, D.C.

Petitioner, Southern Indiana Gas and Electric Company, is an Indiana corporation and has no parent company, subsidiaries (other than wholly owned subsidiaries), or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED . .	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
The Seventh Circuit's upholding the NLRB's allowance of employees to determine their own unit: (a) is contrary to the NLRA, 29 U.S.C. 159, and (b) conflicts with decisions of this Court and other Circuits	9
CONCLUSION	14
APPENDIX	
Opinion and Judgment of Court of Appeals	1a
Order on Petition for Rehearing and Suggestion for Rehearing In Banc	6a

TABLE OF AUTHORITIES

Cases	Page
Globe Machine & Stamping Co., 3 NLRB 294 (1937)	3
H. K. Porter Co. v. NLRB (1970), 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146	8
Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943) .	10, 11
NLRB v. Weyerhaeuser Company, 276 F.2d 865 (7th Cir. 1960) .	10, 12
Pittsburgh Plate Glass Co. v. NLRB (1941), 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 . .	10, 14
United Glass & Ceramic Workers of N.A., AFL-CIO-CLC v. NLRB, 463 F.2d 31 (3rd Cir. 1972) . .	10, 12
Miscellaneous	
National Labor Relations Act Section 8(a)(5), 29 U.S.C. 158(a)(5)	i
Section 9, 29 U.S.C. 159(b) . .	2

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner, Southern Indiana Gas and Electric Company ("SIGECO"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 853 F.2d 580, and is reprinted in the Appendix hereto, p. 1a, infra.

JURISDICTION

The judgment of the Court of Appeals (App. p. 1a, infra) was entered August 3, 1988, with a rehearing and rehearing in banc denied on September 13, 1988. This is reprinted in the Appendix hereto, p. 6a, infra. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 9 of the National Labor Relations Act, 29 U.S.C. 159(b), provides in part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the

> rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining. ...

STATEMENT OF THE CASE

A "Globe"[1] self-determination election was held on February 21, 1986, in the following "voting unit"[2] pursuant to a Stipulation for a Consent Election of Petitioner's employees:

> "All Disconnect/Bill Collectors at the Employer's Evansville, Indiana facility;
>
> BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all salaried office workers."

---

1. Globe Machine & Stamping Co., 3 NLRB 294 (1937).

2. The parties all agreed that the fringe group of Disconnect/Bill Collectors was a "Voting Unit" but did not agree that this group constituted an appropriate collective bargaining unit.

The parties never stipulated in the Stipulation for a Consent Election to an appropriate collective bargaining unit and, in fact, in item 12 of the parties' Stipulation, the term the appropriate "collective bargaining" unit was crossed out by the NLRB Regional Director who substituted the term the appropriate "VOTING" unit.

The Globe election in this case (Appendix I to the Stipulation) provided:

APPENDIX I

> If a majority of valid ballots are cast for LOCAL UNION NO. 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, they will be taken to have indicated the employees' desire to be included in the existing unit (All production, transmission and distribution employees of the Company, but excluding office and clerical employees, armed guards, supervisors), and currently represented by LOCAL UNION NO. 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC.

The production, transmission and distribution employees of the Petitioner

were under an existing collective bargaining agreement at the time of the Globe election and all relevant times thereafter.

A majority of valid ballots were cast indicating the Disconnect/Bill Collectors' desire to be included in the existing unit. On March 3, 1986, the NLRB Regional Director issued a Certification of Results of Election,[3] which in relevant part provides:

> . . .
>
> IT IS HEREBY CERTIFIED that the said organization may bargain for the employees in the above-named category as part of the group of employees which it currently represents ....

---

3. In a Globe election, when a majority of the voting fringe category of employees vote their desire to be included in an existing unit, a Certification of Results rather than a Certification of Representative is issued by the NLRB.

The NLRB has never made a finding or a determination that the Disconnect/Bill Collectors standing alone or combined with the current production, transmission and distribution employees (covered by an existing collective bargaining agreement) were an appropriate collective bargaining unit or units and a Certification of Representative covering either unit was never issued by the NLRB.

Pursuant to the Certification of Results of Election of March 3, 1986, Petitioner entered into collective bargaining negotiations for the category of employees of Disconnect/Bill Collectors to negotiate under what terms and conditions of employment the Disconnect/Bill Collectors would be placed under the existing collective bargaining unit of production, transmission and distribution employees.

At the conclusion of the second collective bargaining session on April 11, 1986, the union broke off further negotiations because SIGECO would not agree to automatically cover the Disconnect/Bill Collectors category of employees with its current collective bargaining agreement which only covered the existing collective bargaining unit. The NLRB, in its Decision and Order, found that SIGECO:

> "... violated Section 8(a)(5) of the Act by refusing to recognize the Union as the exclusive collective-bargaining representative of its employees in the expanded unit, including the 'Globed' disconnect/bill collector employees, and by refusing to bargain on that basis."

The Board reversed the Administrative Law Judge on his order that Petitioner automatically apply the existing collective bargaining agreement to the disconnect/bill collectors and stated "we

do not agree with the judge that the 'Globed' employees come automatically under the terms of the existing collective-bargaining agreement" citing H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970) and holding:

> "Thus, we hold that, although in future negotiations for a new contract the parties in such circumstances must bargain over the unit as a whole, initially either party is free to reject immediate application of an existing contract to the newly represented employees and may bargain separately over their terms and conditions of employment. ..."

Thus, the NLRB upheld the Petitioner's separate bargaining over the terms and conditions of employment covering the Disconnect/Bill Collectors. Although the Board found that Petitioner refused to recognize and bargain with the expanded unit, it never certified the union as the exclusive representative of

Petitioner's employees in the expanded unit.

The Court of Appeals enforced the Board's Decision and Order and found that "the stipulation left it to the collectors themselves to decide by the self-determination election only whether they would be represented as a new part of the existing unit, or remain unrepresented."

REASONS FOR GRANTING THE WRIT

The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act and the NLRB's procedure in unit certification pursuant to Section 9(b) of the Act. The decision of the Court of Appeals conflicts not only with the Court of Appeals for the Seventh Circuit's own decisions in

Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943) and NLRB v. Weyerhaeuser Company, 276 F.2d 865 (7th Cir. 1960), and it also conflicts with the Court of Appeals for the Third Circuit decision in United Glass & Ceramic Workers of N.A., AFL-CIO-CLC v. NLRB, 463 F.2d 31 (3rd Cir. 1972), but more importantly it is contrary to this Court's holding in Pittsburgh Plate Glass Co. v. NLRB (1941), 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251, holding that the wishes of the employees are only one factor in the Board's determination of an appropriate bargaining unit.

It is contrary to the Act, and well-settled case law dictates that the NLRB may not delegate to the employees its duty to determine an appropriate collective bargaining. Simply stated,

the results of a Globe self-determination election cannot substitute for an appropriate unit determination but is only one factor to be looked to by the NLRB in making such determination.

In Marshall Field & Co. v. NLRB, 135 F.2d 391 (7th Cir. 1943), that Court of Appeals set forth the general doctrine concerning Globe elections as not substituting for NLRB unit determinations as follows:

> [1] (1) The failure of the Board to designate the unit before holding the election. The Board should have decided upon the unit or units appropriate for collective bargaining, before it called an election (Section 9(b); Pittsburgh Glass Co. v. National Labor Relations Board, 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251; Report of the Senate Committee, No. 573, 74th Congress 1st Session, page 14).
>
> [2] (2) The Board may not delegate the selection of the bargaining unit to the employees. While the wishes of the employees may be considered,

> the Board should not and, under the statute, can not leave this determination to either the employer or the employee.

Further, the Third Circuit Court of Appeals in United Glass & Ceramic Workers of N.A., AFL-CIO-CLC v. NLRB, 463 F.2d 31 (3rd Cir. 1972), found that absent a finding of mutually appropriate units, the Board by conducting a self-determination election to determine the appropriate unit improperly delegates to the employees its statutory obligation to determine the appropriate unit. Also, the Court of Appeals for the Seventh Circuit in NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960), held that the procedure for using a self-determination election in determining an appropriate unit is for the Board to first establish what is the appropriate collective bargaining unit thereby determining whether the unit with the

fringe group would be an appropriate unit before the election and then conducting the election.

If employees through self-determination Globe elections were allowed to make unit determinations, the Board, for example in hospital bargaining unit determinations (currently in the NLRB rulemaking process), could simply allow the employee group in question to make their own unit determination if they wanted to be combined with another group of employees without the Board making the statutorily mandated unit determination. Contrary to the court of appeals, the NLRB and not "the collectors themselves" should have made the requisite unit determination taking into consideration, as one factor, the desires of the Disconnect/Bill Collectors to be represented by the union as part of the

expanded unit. This is required by Section 9(b) of the NLRA.

The Seventh Circuit has thus created a confusing precedent, likely to generate even further confusion among the other circuits. It is a precedent that is also directly at odds with this Court's ruling in Pittsburgh Plate Glass Co. v. NLRB (1941), 313 U.S. 146. Plenary consideration of the use of a "Globe" self-determination election by the NLRB to substitute for a unit determination is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 1988

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2477

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED MARCH 31, 1988—DECIDED AUGUST 3, 1988

Before WOOD, JR., POSNER, and EASTERBROOK, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Petitioner, National Labor Relations Board, seeks to enforce its order against Respondent, Southern Indiana Gas and Electric Company, located in Evansville, Indiana. The Board's order required the company to cease and desist from its unlawful conduct and from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their statutory rights. In particular the order requires the company to bargain with the union in the unit found appropriate and to post a remedial notice.

The company is a public utility, which supplies electricity and natural gas to its customers. Beginning in 1944

the company's production, transmission, and distribution employees, presently numbering about 550, have been represented by Local Union No. 702, International Brotherhood of Electrical Workers and have worked under a series of negotiated collective bargaining agreements.

There are, however, two or three employees referred to as disconnect/bill collectors who are not union members and whose positions are not covered by the collective bargaining agreement. This case involves only the union's representation of two or three employees. Considering the size of this group and the obvious lack of merit in the company's position, we do not understand why the company has stubbornly refused to comply with the Board's order that it treat these two or three employees as members of the existing 550-member unit. Bringing this minimal case into this court is a waste of resources; a public utility should demonstrate greater public responsibility. This court directs that the Board's order be enforced forthwith in all particulars.

I. FACTUAL BACKGROUND

In September, 1985, the union filed a petition with the Board seeking to represent the two or three collectors. In October the parties entered into a Stipulation for Certification Upon Consent Election. This stipulation provided for a self-determinative election to give the collectors an opportunity to say whether they would like to join the existing bargaining unit, or whether they preferred to remain unrepresented. The Board conducted the election for the three eligible voters, and the result was a unanimous choice to join the existing bargaining unit. An objection followed, which resulted in another stipulation for a rerun election under the same terms and conditions as the first. In February, 1986, the Board conducted the second election, and again the result was an overwhelming unanimous vote of three for the union. Thereafter, in March, 1986, the Regional Director certified the results of the election and provided that the union "may bargain" for the col-

lectors as part of the group of employees in the original unit, which the union currently represented.

That same month bargaining began. The union sought to bargain about contract provisions for the collectors' wages, layoffs, promotions, and other issues. The company came to the table only to negotiate a separate and distinct agreement for the collectors, who would constitute a separate and distinct bargaining unit. The company would not recognize the three collectors to be a part of the existing unit for the other employees, but sought to create a separate unit for these three collectors. The union responded that the issue of whether the collectors were part of the existing unit had been decided by the election, and the collectors were now part of that unit. The company disputed that was what the election meant. It was the company's position that the Board had never certified that the union in fact represented the collectors as part of the existing unit but had only certified that the union "may" bargain for the collectors. Further, it was the company's position that there had been no actual findings that the collectors were part of the existing unit. Negotiations ceased, and in June, 1986, the union filed an unfair labor practices charge, alleging that the company's refusal to bargain with the collectors as part of the existing unit pursuant to the election violated the National Labor Relations Act.[1] The company responded that its position was correct, as the union had never been properly certified as the bargaining representative of the existing unit as augmented by the two or three collectors.

An administrative law judge held a hearing and in relevant part found that the company was in violation of section 8(a)(1) and (5) of the Act[2] because of its refusal to bargain with the union concerning the collectors inclusion in the existing unit. The Board agreed and now seeks the enforcement of its order.

---

[1] 29 U.S.C. §§ 1-651.

[2] 29 U.S.C. § 158(a)(1), (5).

II. DISCUSSION

We understand the company's position to be that the Board failed to make a determination that the existing unit was the appropriate unit to bargain for the collectors because the Board improperly delegated to the employees through a *Globe* self-determination election its statutory obligation to make the determination. In a *Globe* election, the name adopted from *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294 (1937),[3] fringe group employees are accorded the opportunity to choose between being represented as their own distinct group or being represented as part of the existing larger unit. The company now says that its position was not that the collectors had to be a separate unit, only that the company was willing to bargain over which unit was designated to bargain for the collectors.

It may be helpful to review the usual procedures followed when a union representing most of the employees petitions to represent some fringe employees. The Board begins a two-step process. First, the Board conducts a representation proceeding to determine whether the larger existing unit together with the fringe employees would constitute an appropriate bargaining unit. The appropriateness of the unit's representation may be contested,[4] which it appears the company seeks to do by belatedly trying to bargain with the union about it. The initial hearing about the appropriate unit, however, may be waived by stipulation between the parties.[5] Once the parties enter into a stipulation of that nature the parties are bound by their

[3] *See NLRB v. American Printers & Lithographers*, 820 F.2d 878, 880 (7th Cir. 1987), *enforcing* 275 N.L.R.B. 1490 (1985); *Federal-Mogul Corp.*, 109 N.L.R.B. 343 (1974).

[4] *See* section 9(c)(1) of the Act (29 U.S.C. 159(c)(1)) and section 102.62-.69 of the Board's Rules and Regulations, series B as amended (29 C.F.R. § 102.62-.69).

[5] *See* section 9(c)(4) of the Act (29 U.S.C. § 159(c)(4)) and section 102.62 of the Board's Rules and Regulations.

agreement unless it violates the Act or Board policy. In the present case a stipulation was entered into. The representation proceeding was therefore rendered unnecessary. The second step of the process is a self-determination election to give the fringe employees their choice, whether they preferred to be represented by the existing unit, which in this case has been stipulated to be an appropriate unit, or whether they preferred to remain unrepresented.

The company seeks to avoid the clear impact of the stipulation it admittedly entered into and engages in extraneous arguments which are not applicable in view of that stipulation. We therefore need not pursue those arguments in this opinion. The company stipulated away any right it had to contest or negotiate about the appropriate bargaining unit. The stipulation left it to the collectors themselves to decide by the self-determination election only whether they would be represented as a new part of the existing unit, or remain unrepresented. If the majority of the collectors did not choose the existing unit, that would indicate that the collectors preferred to continue unrepresented as they had been in the past. By the election, however, the collectors chose to become a part of the existing unit. That was the end of that phase. Therefore the company was bound by the stipulation and the self-determination election to accept the existing unit and to begin the negotiations about the matters the union originally sought to negotiate with the company on behalf of the collectors. That should have been done over two years ago for this small group of employees without the expenditure of the time, money and effort of the parties, and the intervention of this court.

ENFORCED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—8-3-88—475

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

September 13, 1988

BEFORE

HON. HARLINGTON WOOD, JR., Circuit Judge

HON. RICHARD A. POSNER, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

No. 87-2477	)	
	)	On Application For
NATIONAL LABOR	)	Enforcement of an
RELATIONS BOARD,	)	Order of the National
Petitioner,	)	Labor Relations Board
	)	
v.	)	
	)	
SOUTHERN INDIANA	)	
GAS AND ELECTRIC	)	
COMPANY,	)	
Respondent	)	

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause on

August 16, 1988, by respondent Southern Indiana Gas and Electric Company, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-973

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October Term, 1988

SOUTHERN INDIANA GAS AND ELECTRIC COMPANY
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

	Page
Decision and Order dated July 9, 1987 (National Labor Relations Board)	1a
Decision dated January 9, 1987 (NLRB Administrative Law Judge Richard H. Beddow, Jr.) . . .	12a

284 NLRB No. 98

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SOUTHERN INDIANA GAS &
ELECTRIC COMPANY

and Case No. 25-CA-18066

LOCAL UNION NO. 702,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, a/w
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
AFL-CIO-CLC

DECISION AND ORDER

On 9 January 1987 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

We agree with the judge that Respondent violated Section 8(a)(5) of the Act by refusing to recognize the Union as the exclusive collective-bargaining representative of its employees in the expanded unit, including the "Globed"[1] disconnect/bill collector employees, and by refusing to bargain on that basis. We do not agree with the judge that the "Globed" employees come automatically under the terms of the existing collective-bargaining agreement. We note, as the Supreme Court found in H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970), that

> While the Board does have power . . . to require employers and employees to negotiate, it is without power to

1. Globe Machine & Stamping Co., 3 NLRB 294 (1937)

> compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.

In Federal-Mogul Corp., 209 NLRB 343 (1974), where, as here, an unrepresented group of employees voted to be represented as part of the existing unit, we found that the company and the union had an obligation to bargain over the working conditions of those employees as part of the already recognized unit. However, neither party was obligated to apply the terms of the existing collective-bargaining contract to the newly represented employees, as there had been no bargaining and agreement over the terms and conditions of their employment.

Thus, we hold that, although in future negotiations for a new contract the parties in such circumstances must bargain over the unit as a whole, initially either party is free to reject

immediate application of an existing contract to the newly represented employees and may bargain separately over their terms and conditions of employment. Therefore, and consistent with H. K. Porter, we will modify that part of the judge's remedy and recommended Order which requires application of any of the existing contracts to the newly represented employees.

Amended Conclusions of Law

Substitute the following for paragraphs 4 and 5.

"4. By failing and refusing to accept the disconnect/bill collector employees as part of the existing bargaining unit subsequent to the Regional Director's issuance of a Certification of Results of Election, and by failing and refusing to bargain collectively over terms of particular

applicability to these employees in good faith with the Union as the exclusive representative of the Respondent's employees in the appropriate unit, it has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Southern Indiana Gas & Electric Company, Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b) and (c) and reletter the subsequent paragraph.

"(b) Failing and refusing to bargain collectively with Local Union No. 702 over the terms and conditions of employment applicable to the disconnect/ bill collector employees, newly included in the unit."

2. Substitute the following for paragraphs 2(b) and (c) and reletter the subsequent paragraphs.

"(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate and, if an agreement is reached, embody it in a written and signed contract."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 9 July 1987

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize our disconnect/bill collector employees as part of the existing unit of Local Union No. 702, International Brotherhood of Electrical Workers, AFL-CIO-CLC.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive representative of the employees in the unit set forth below concerning terms and

conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the union as the exclusive bargaining representative of our employees in the single unit set forth below:

> All production, transmission and distribution employees of the Employer, including all disconnect/bill collectors, at the Employer's Evansville, Indiana, facility; but excluding all office clerical employees, all professional employees, all guards and all supervisors as

defined in the Act, and all salaried office workers.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

SOUTHERN INDIANA GAS & ELECTRIC COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Minton-

Capehart Federal Building, Room 238, 575 North Pennyslvania Street, Indianapolis, Indiana 46204, Telephone 317-269-7413.

JD-3-87
Evansville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTHERN INDIANA GAS &
ELECTRIC COMPANY

and Case 25-CA-18,066

LOCAL UNION NO. 702,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, a/w
INTERNATIONAL BROTHERHOOD
OF ELECTRIC WORKERS,
AFL-CIO-CLC

J. Frederick Gatzke, Esq. of
Indianapolis, IN for the General Counsel.
David E. McNeely, of West Frankfort, IL,
for the Charging Party.
Arthur D. Rutkowski, Esq., of Evansville,
IN, for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard in Evansville, Indiana, on 3 October 1986. Subsequently, briefs were filed by General Counsel and the Respondent.

The proceeding is based upon a charge filed 16 June 1986, by International Brotherhood of Electrical Workers, Local Union 702 AFL-CIO-CLC. The Regional Director's complaint dated 7 August 1986, alleges that Respondent, Southern Indiana Gas & Electric Company, of Evansville, Indiana, violated Section 8(a)(1) and (5) and 8(d) of the National Labor Relations Act by refusing to recognize and include certain employees as part of a bargaining unit under an existing collective bargaining agreement and failing and refusing to bargain in good faith with the Union.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following findings:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the supplying of electricity and natural gas as a public utility. It has gross annual business in excess of $100,000 and it annually receives goods valued in excess of $50,000 from suppliers located outside of Indiana. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2)(6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

On 18 October 1985, the Regional Director approved a Stipulation For Certification Upon Consent Election entered into by the Respondent and the Union, calling for an election among the

Respondent's Disconnect/Bill Collector employees on 8 November 1985. This stipulation describes "The Appropriate Voting Unit," with the word "Voting" typed in over the crossed out phrase "Collective Bargaining" and describes the unit in the same manner as the Notice for a Rerun Election set forth below. This election was set aside on 21 January 1986 and a Notice of a rerun Election for 21 February 1986 was issued.[1]*

As pertinent, the Notice for the rerun election states:

VOTING UNIT

> Those eligible to vote are all Disconnect/Bill Collectors at the Employer's Evansville, Indiana facility who appear on the payroll for the period ending SUNDAY, JANUARY 5, 1986;

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* All footnotes appear at the end of the text of this Decision.

BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all salaried office workers.

(If a majority of the employees in the voting group vote against representation they will be taken to have indicated their desire to remain unrepresented. If a majority vote for representation, they will be taken to have indicated their desire to be included in the existing unit of production, transmission and distribution employees currently represented by LOCAL UNION NO. 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC. In any event, a certification of results of the election will issue).

A majority of valid ballots were cast for representation and, on 3 March 1986, the Regional Director issued a Certification of Results of Election which states:

> "IT IS HEREBY CERTIFIED that the said organization may bargain for the employees in the above-named category as part of the group of employees which it currently represents."

On 26 March 1986, the Union and Respondent met and began negotiations. The Union stated it was there to negotiate terms specifically applicable to the Disconnect/Bill Collectors wage rate, uniforms, lay off and promotion schedule, and assignments to existing departments. The Company responded that it was there to negotiate a separate and distinct agreement for the collectors and stated that they would be a separate and distinct

bargaining unit. The Union responded that the Company's acceptance of this election process placed the two Disconnect/Bill Collectors in the existing unit of approximately 550 either employees but Respondent denied that they automatically went into the existing unit.

A second meeting was held on 11 April. At the Respondent's request, the Union presented a written proposal embracing the subjects noted above and a wage schedule the same as that for Meter Readers under the existing agreement. The Company repeated its position that the employees did not go into the agreement automatically and stated that the issue as far as these employees going into the existing unit, is subject to the bargaining process" and it continued to demand a separate collective-bargaining agreement to cover the two Disconnect/Bill Collectors employees.

Shortly after this second meeting, the Union business representative, told Respondent's Director of Industrial Relations, Rodney Penfield, that he could still not understand why the Respondent would not agree to include the two employees in the existing unit. Penfield indicated that he was willing to look at any documents the Union had bearing on the Respondent's obligation to include them in the unit. The Union then sent Penfield a letter, dated 18 April 1986, attaching the stipulation and the Election Certification as authority supporting the Union's contention that it had the right to bargain for the employees as part of the existing unit.

By certified letter of 20 May 1986, Penfield responded contending that the Director's Certification of Results did not certify that the Union represented the

Disconnect/Bill Collectors employees specifically as part of the existing unit, and that the Director merely said that the "Union may bargain for the employees". No further negotiation were held and, as noted, the Union filed a charge on 16 June.

III. Discussion

The General Counsel argues that the certification of the results of a self determination election, where the employees have designated a labor organization as their exclusive bargaining representative, automatically includes those employees in the existing unit and obligate the employer to apply to the newly represented employees, so far as practicable, its existing collective-bargaining agreement with the employee unit. Respondent, on the other hand, argues that a "Globe" election does not take the place of a Board finding with

reasons therefor that a new unit is appropriate and that the Regional Director never specifically found the Disconnect/ Bill Collectors to be an appropriate bargaining unit. It thus asserts that as the unit is not properly certified, the company cannot be found to have unlawfully refusal to bargain. It also contends that it cannot automatically cover a group of employees in an existing collective-bargaining agreement as this would compel the company to agree to a concession in contravention of 8(d) of the Act and that, in any event, there is no evidence that Respondent refused to negotiate about placing the new employees in the existing unit or refused to bargain over the terms of an agreement for these employees.

It is well settled that in the absence of special circumstances, a Respondent in

a Section 8(a)(5) proceeding is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding, see Baldwin League, 281 NLRB No. 134 (1986), citing Pittsburgh Glass Co. v. NLRB, 313 U.S. 146 (1941).

The Respondent does not offer to show special circumstances or to adduce evidence showing some separate community of interest that could warrant separate unit representation and, otherwise, there is no evidence of record and no applicable presumption that might justify the recognition of separate units. Here, there is no indication that the Regional Director failed to make an appropriate finding on the composition of the unit. It appears that if the question had been raised, the Disconnect/Bill Collectors

employees would be found to be similar to Respondent meter reader employees and it appears that under circumstances where there is an existing plant (not craft), unit involved, it is obvious that a separate unit for two employees would not be appropriate, see Hall's Super Duper, 281 NLRB No. 150 (1986), and under these circumstances, I also find Respondent's reliance upon the dictim in the dissent in Libbey-Owens Ford, 202 NLRB 29, at page 31, to be inapposite to the present situation.

Here, the election certification identifies the Disconnect/Bill Collectors as the category of employees which has designated the Union as their representative, however, the Director then specifically certifies that the Union: may bargain for the employees in the above-named category as part of the group of

employees which it currently represents (emphasis supplied). It is abundantly clear from this specific language as well as the references at numerous earlier stages of the election proceeding to inclusion of these employees in the existing unit (see the description of the voting unit in the Notice for the rerun election and the stipulation set forth and referred to above), that the logical and unambiguous intent and meaning of the entire election process was to allow a new group of employees to become part of the existing represented group.

In connection with that portion of the certification reading "may bargain" it also is clear that to the extent the phrase can be considered to be merely permissive language, the phrase applies only to the Union (which must first request an employer to bargain to initiate

any corresponding obligation to bargain) and in no manner can it be considered to allow or imply that the employer has some choice whereby it may refuse to meet its mandatory duty to bargain.

The record here shows that in two meetings in March and April Respondent twice adamantly insisted that the Union first had to bargain over whether the Disconnect/Bill Collectors should go into the existing unit and it further demanded that a separate and distinct collective-bargaining agreement be negotiated. This was followed by a May letter in which Respondent set forth a "formal statement" which reiterated its position while seizing upon the language of the Certification that said that the "Union may bargain for the employee" and said it was willing to negotiate a separate agreement but that "we will not" reopen

the existing agreement or, in effect, cover the Disconnect/Bill Collectors under the existing unit and agreement. No offer was made to continue any bargaining except on its terms and, accordingly, I find that there is sufficient evidence to support a finding that Respondent has refused to negotiate or bargain with the Union as the exclusive representative of the employees in the approved bargaining unit. Under these circumstances, I find that Respondent has arbitrarily and capriciously elected to delay or avoid recognition of its employees choice to be included in an existing bargaining unit and I concluded that its conduct constitutes an unlawful refusal to bargain in violation of Sections 8(a)(5) and (1) and 8(d) of the Act, as alleged, see UGI Corporation, 276 NLRB No. 131 (1985) and American Printers, 275 NLRB No. 208 (1985).

IV. Conclusion of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Since the issuance of a Certification of Results of Election on 3 March 1986, the unit set forth herein constitutes a single bargaining unit, inclusive of Respondent's Disconnect/Bill Collectors employees, appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. At all times material herein, Local Union No. 702 has been the exclusive collective-bargaining representative of the employee in the expanded, single unit which is:

> All production, transmission and distribution employees of the Respondent, including all Disconnect/Bill Collectors, at the

Respondent's Evansville, Indiana, facility; but excluding all office clerical employees, all professional employees, all guards and all supervisors as defined in the Act, and all salaried office workers.

4. By failing and refusing to accept the Disconnect/Bill Collector employees as part of the existing bargaining unit subsequent to the Regional Director's issuance of a Certification of Results of Election, and demanding that these employees be in a separate unit, Respondent has violated Section 8(a)(5) and (1) and 8(d) of the Act.

5. By failing and refusing since 26 March 1986 to recognize apply appropriate terms of its existing collective-bargaining agreement to its Disconnect/Bill Collectors employees and

by failing and refusing to recognize and to bargain collectively over terms of particular applicability to these employees in good faith with the Union as the exclusive representative of Respondent's employees in the unit described herein, it has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) and 8(d) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices, I find it necessary that it be ordered to cease and desist therefrom, and to recognize the Disconnect/Bill Collectors employees as part of the existing unit, subject to its mutually applicable terms and, upon request, bargain collectively with the Union, with respect to terms of

particular applicability to these employees.

In addition, it appears that since 26 March 1986 Respondent's Disconnect/Bill Collectors employees may have been deprived of contractual benefits common to all other unit employees as a result of Respondent's arbitrary and capricious failure and refusal to include them within the general terms of the existing agreement and its failure to bargain over specifically applicable terms of employment and, accordingly, it shall be required to give retroactive effect to all terms, including those subsequently negotiated with respect to specifically applicable terms, including wages, and make these employees whole for any such loss suffered as a result of Respondent's illegal practices in accordance with F.W. Woolworth Company, 90 NLRB 289 (1950),

plus interest as computed in Florida Steel Corporation, 231 NLRB 651 (1977).

As part of the relief sought, the General Counsel also seeks imposition of a so called "visitorial clause" whereby the Board would be authorized to engaged in certain discovery activities in order to monitor compliance. Although the imposition of such a provision recently has become a common practice, there is no showing that it is of particular applicability or usefulness in dealing with the type of unfair labor practice involved in this proceeding. Accordingly, the request is denied and no visitorial clause will be imposed as part of the order herein.

Upon the foregoing findings of fact and conclusions of law, upon the entire record in this case, and pursuant to

Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

Respondent Southern Indiana Gas & Electric Company, its agents, successors and assign, shall, jointly and severally:

1. Cease and desist from:

(a) Failing and refusing to recognize its Disconnect/Bill Collector employees as part of the existing unit of Local Union No. 702 International Brotherhood of Electrical Workers AFL-CIO-CLC.

(b) Failing and refusing to apply the general terms of its current collective-bargaining agreement with Local Union No. 702 to the Disconnect/Bill Collector employees in all areas where that agreement applies equally and uniformly to all unit employees.

(c) Failing and refusing to bargain collectively with Local Union No. 702 over

such terms of the current bargaining agreement that do not apply equally and uniformly to all unit employees, as most particularly applicable to the Disconnect/ Bill Collector employees, newly included in the unit.

(d) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to remedy the violations found herein and to effectuate the policies of the Act.

(a) Recognize Local Union No. 702 International Brotherhood of Electrical Workers AFL-CIO-CLC as the exclusive bargaining representative of its employees in the following single unit:

All production, transmission and distribution employees of the

Respondent, including all Disconnect/Bill Collectors, at the Respondent's Evansville, Indiana, facility; but excluding all office clerical employees, all professional employees, all guards and all supervisors as defined in the Act, and all salaried office workers.

(b) Retroactively apply the general terms of its current collective-bargaining agreement with Local Union No. 702 to the Disconnect/Bill Collectors employees not previously included in the unit, in all areas where the agreement applies equally and uniformly to all unit employees.

(c) Upon request, bargain in good faith with the above-named Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate herein respecting

such terms of the current bargaining agreement that otherwise do not apply equally and uniformly to all unit employees with specific application to the Disconnect/Bill Collectors recently added to the unit, and, if an agreement is reached, embody it in a written and signed contract, and make these employees whole for any losses incurred as a result of the illegal practices in the manner specified in the section above entitled "Remedy".

(d) Post at its Evansville, Indiana, plant copies of the attached notice marked "appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted immediately upon receipt thereof in conspicuous places, including all places where notices to employees are customarily posted, and be maintained in

all such places for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 25 in writing, within 28 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. 9 January 1987.

/s/ Richard H. Beddow Jr.
Richard H. Beddow Jr.
Administrative Law Judge

Footnotes

1. The General Counsel requests notice to be taken of the proceedings in Case No. 25-RC-8249 and moves to substitute an attached Notice to Employees for that Notice currently in the record as (G.C. 5), thus conforming the record to the intent of the parties. He further represents the (G.C. 5) inadvertently reflects the prior notice for the initial 1985 election. While copies given to the parties may have been the earlier dated document, the official record contains the Notice for 1986 as GC-5, therefore no substitution is necessary.

Additionally, the General Counsel ask that notice be taken of the Stipulation To Set Aside Election and Stipulation For Conducting rerun Election (also attached to his

motion), in which the parties agreed that all procedures subsequent to the conclusion of the counting of the ballots in the rerun election would be governed by the terms and provisions of the original Stipulation For Certification Upon Consent Election (G.C. 4). Accordingly, Counsel for the General Counsel seeks a finding that the Certification Of Results for rerun election are based on the results of the election conducted on 21 February 1985 and moves to amend paragraph 5(c) of the complaint herein to allege a 21 February 1986 self determination election, rather than one of November 8, 1985.

I find that good cause is shown for the granting of the relief requested and official notice is taken of the "record" in the representation

proceedings, see Frontier Hotel, 265 NLRB 343 (1982), and the appendices submitted by General Counsel. The corresponding motion to amend the complaint to reflect the appropriate date is also granted.

2. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

3. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall

read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to nor refuse to recognize our Disconnect/Bill Collector employees as part of the existing unit of Local Union No. 702 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO-CLC.

WE WILL NOT fail to nor refuse to apply the terms of our current collective-bargaining agreement with Local Union No. 702 to the Disconnect/Bill Collectors employees in all areas where that agreement applies equally and uniformly to all unit employees.

WE WILL NOT FAIL to nor refuse to bargain-collectively with Local Union No. 702 over such terms of the current bargaining agreement that do not apply equally and uniformly to all unit employees, as most particularly applicable

to the Disconnect/Bill Collector employees, newly included in the unit.

WE WILL recognize Local Union No. 702 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO-CLC as the exclusive bargaining representative of our employees in the single unit as set forth in the Order of the Administrative Law Judge Decision.

WE WILL retroactively apply the terms of the agreement and make the employees whole for any losses they incurred as a result of the unlawful actions.

SOUTHERN INDIANA GAS & ELECTRIC COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office: Minton-Capehart Federal Building, Room 238, 575 North Pennsylvania Street, Indianapolis, IN 46204, Telephone 317-331-7413.